CIVIL APPEAL.

D. A. Devadason for the appellants.

Yau Meng Fai for the respondent.

Pawan Ahmad J.: This is an appeal by the plaintiffs against the decision of the learned magistrate Malacca for dismissing their claim for vacant possession of premises known as No. 14B, Pengkalan Rama, Malacca. The plaintiffs are a limited company carrying on the business of motor car dealers at No. 14, Pengkalan Rama, Malacca, and the defendant is in occupation of the said premises.

When the plaintiffs became the landlords of the premises in question in 1961, one Leong Fatt alias Leong Weng Keng was the tenant but he was not in occupation of it when this action was filed. He vacated from the premises when his wife died some nine years prior to the date of trial but he continued to pay the rent and with his permission his son, the defendant, continued to remain in occupation of the premises.

In 1964 when the plaintiffs wanted to demolish the premises in furtherance of their expansion plan they sent through their solicitors a notice to quit (P.1) to be served on Leong Fatt alias Leong Weng Keng by A. R. register addressed to the premises in question. The A. R. card was in the course of the trial produced by the plaintiffs as exhibit P.4.

By the time this case came up for trial before the learned magistrate, Leong Fatt alias Leong Weng Keng had died. The premises in question falls under the Control of Rent Ordinance 1956 and counsel for both parties by consent agreed that there was only one issue to be determined by the court, and the issue was whether or not the defendant was a trespasser. The learned magistrate found as a fact that the defendant was in occupation of the premises with the permission of his father and was therefore not a trespasser.

In order to decide on the present issue I think it will be necessary first of all to consider whether the notice to quit was properly served. In the case of *Lim Kien Mok* v. *B. H. Kevan*,[1] it was held that the rule as regards service on the tenant is that the notice left at the tenant's house, but not served on anyone personally, is effectual if it is proved that it actually came to his hands in time to give him notice of the proper length; but in the present case the notice to quit was sent by A. R. register for service on Leong Fatt alias Leong Weng Keng at the premises in question but he was not at that time residing at the premises but at No. 153E Bukit China Dalam, Malacca. It is also clear from the evidence of the defendant that the notice to quit was not received by the defendant's father but by some unknown person. Since the notice to quit has not been proved by the plaintiffs to have been served on Leong Fatt alias Leong Weng Keng his tenancy was never lawfully determined by the plaintiffs and therefore the plaintiffs cannot in law maintain any action of trespass against the defendant who was in occupation of the premises with the permission and authority of Leong Fatt alias Leong Weng Keng, the lawful tenant. See the case of *Kam Sam Mooi* v. *Shin Heong Long* [2]).

The appeal is accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *D. A. Devadason; Murphy & Dunbar.*

CHAN KET MING v. VOO SUI LIM

[F.C. (Pike C.J. (Borneo), Ong Hock Thye and MacIntyre F.JJ.) April 29, 1968]

[Kota Kinabalu — Federal Court Civil Appeal No. X.9 of 1967]

Contract — Breach of — Contract to extract timber — Making earth road across land a condition — Alleged breach of condition — Recission of agreement — Damages.

The plaintiff/respondent brought an action for damages for breach of contract. The breach alleged was that the defendant/appellant had wrongfully refused to permit him to enter upon the third and final stage of the felling and extraction of timber from the defendant/appellant's land. The parties, during the course of the hearing agreed the amount of damages at $26,000 if judgment were to be given for the respondent and the pleadings were amended accordingly.

By an agreement entered into between the appellant and respondent it was agreed that in consideration of the payment of $44,000 the respondent should have the exclusive right to enter on certain land of an area of approximately 100 acres belonging to the appellant and to extract timber therefrom. The extraction was to take place in three stages, namely extraction from 10 acres for the first stage, 50 acres for the second stage and 40 acres for the third stage and the respondent was to pay to the appellant on entering upon each stage $10,000, $20,000 and $14,000 respectively.

Clause 3 of the agreement required the respondent to make an earth road across the land and it was the alleged breach of this clause by the respondent which led to the recission of the agreement by the appellant. Clause 3 was as follows: "The contractors agree to make an earth road across the said land on the site as directed by the licensee, the making of such road shall also be on the same footing as the payment of the capital sum hereby agreed to be paid. That is to say the contractors shall construct the road in stages. The road shall be of a total width of 18 feet but the middle portion shall only be of 12 feet in width."

Because of the alleged breach by the respondent of this clause the appellant rescinded the agreement and refused to allow the respondent to enter upon the third stage of extraction of timber. The appellant alleged that the respondent had not built any road. The respondent maintained that he had built an earth road which was in accordance with the very vague description of the type of road appellant gave him and that he handed the road over to the appellant in two stages, namely that

part of the road which he made across the first stage of 10 acres and the part made across the second stage of 50 acres and that on neither of the occasions when he handed over these portions of road did the defendant then reject them or complain as to their construction.

The learned judge who saw and heard the witnesses accepted the respondent's evidence on this aspect of the case and decided that the respondent had made an earth road sufficient in quality and extent to satisfy the requirements of clause 3 and such sketchy instructions as the appellant gave him as to its purpose and construction.

From this decision the appellant appealed.

Held (Pike C.J. (Borneo) and MacIntyre F.J., Ong Hock Thye F.J. dissenting), dismissing the appeal: there was ample evidence before the learned trial judge apart from the demeanour of witnesses, to justify his finding of fact that a road had been constructed, in accordance with the agreement.

Per Ong Hock Thye F.J. (dissenting): "the salient fact which appears to have been overlooked is that work on stage II was performed by a sub-contractor. Road construction, if it ever was done, should have been part and parcel of the job of extracting timber. Yet the sub-contractor was never called to give evidence. With all respect to the learned judge, therefore, the whole of the evidence leads me to conclude that what the respondent attempted to pass off as a road was nothing more than the track made when logs were dragged out by tractor. The onus of proof should have been discharged by the respondent, as plaintiff, for him to be entitled to succeed. On the evidence I hold that he failed to do so. He was in breach himself and, as the party in default, he was hardly in a position to complain of a breach by the other."

Cases referred to:—

(1) *Yuill* v. *Yuill* [1945] P. 15, 19, 20.

(2) *Buckingham* v. *Daily News Ltd.* [1956] 3 W.L.R. 375, 380, 389.

(3) *British South Africa Co.* v. *Lennon*, A.I.R. 1915 P.C. 50, 51.

(4) *Tan Ah Boon* v. *State of Johore* [1936] M.L.J. 187, 190, P.C.

FEDERAL COURT.

Shelly Yap for the appellant.

Michael Yong for the respondent.

Cur. Adv. Vult.

Pike C.J. (Borneo) (having stated the facts relevant to the appeal, continued): The memorandum of appeal sets out six grounds of appeal but at the hearing of the appeal the appellant's counsel, Mr. Shelley Yap, indicated that he would be arguing only ground III which related to an agreed English translation of a Chinese letter written by the respondent to the appellant.

The burden of the appellant's counsel's argument on this letter is that it must be given its literal meaning and construed against the writer and that if strictly construed according to the ordinary meaning of the words used the clear implication to be drawn from it is that the respondent had never constructed a road at all. His argument was, if I followed it correctly, that because he used the expression "construction of earth road" in paragraph 1 and repeated the expression "construction" rather than "repair" in other places in the letter it indicates that he had not previously built any road at all. If he had he would not have talked about "construction" but "repairs" or "re-construction."

In my opinion this letter does not bear this interpretation. To my mind it is clear that it must be construed with due regard to the circumstances in which it came to be written, namely (a) at a time when the respondent had performed a considerable part of the extraction of timber which the agreement gave him the exclusive right to extract and in order to extract which he must have built a road of some sort in order to get the timber out; and (b) that it was not until December 1964 *i.e.* some 6 months after the respondent completed extraction on the second stage that the appellant first had his advocate write to the respondent alleging that he had not built the earth road required by clause 3 of the agreement.

Furthermore the letter must be read as a whole and it must be borne in mind that it was not written by a person of great education and that it is a translation from the Chinese and probably has lost something in translation. It became apparent during the hearing of the appeal and as a result of an observation by Mr. Justice Ong that the agreed translation cannot be said to be entirely accurate and I believe careful examination of the translation will reveal other errors, for example, at the bottom of the English translation, the word "Person undertaking to construct road signed Voo Sui Lim" appear. I believe these words are not to be found on the original. Looking at the first paragraph one sees reference to "the repairs of the road". To what road does this refer? In my opinion he is clearly referring to the road which he made and which he had previously offered to repair if he was permitted to enter on the land for the third stage of extraction. Again in paragraph 2 of the letter is found the expression:—

"I fear that after completion of the work Tsen Ket Ming will again find all sorts of excuses saying this and that has not been done according to his wish. . . ."

This "*again*" surely implies that he is claiming that he had made a road as to which the appellant was not satisfied.

Looking at the evidence of the appellant it seems to me clear that the allegation in his defence that the respondent had not made a road at all is not substantiated.

In examination in chief the appellant stated (at p. 57 of the record):—

"Built no road on stage 1. On stage 2 he made a small road for extracting timber."

In cross examination he stated:—

"He opened road with a tractor. Road on stage 1 not completed before Voo moved into 2nd stage. When

he entered 2nd stage Voo opened a road on stage 1 with a tractor."

At p. 67 line F he states:—

"I say it is not an earth road as it was only a tractor track. A road used by a tractor is a bad one water remains in the plenty of holes on it.

If it had been levelled holes filled in and made 18 feet wide I would accept it as an earth road. But he did not do it."

Turning now to page 70 line C the appellant stated:—

"We planted the road made by Voo on 2nd stage with rubber trees. Also planted track made by Voo on 1st stage."

And in re-examination at page 70 line G:—

"I agree there was a track on stage 1. The 1st 75% was *good road.*"

It is clear, even from the written record, that the appellant's evidence was contradictory. One question which springs to mind is why, as is admitted by the appellant, did he plant over the road made by Voo on the 2nd stage and the track (which was 75% good road) on the first stage if, as seems clear the need for a road was so important as to justify the recission of the agreement because of alleged failure to make one. Furthermore the appellant stated he had contracted with Ng Yu Loi to make a road over the land and that road was:—

"Not to be different from Yoo's road. He would follow old trace made by Voo" (*vide* p. 70 line G).

It seems to me that the letter read as a whole and with due regard to the events which had occurred between the appellant and the respondent at the time it was written says no more than this:—

"While I have said I will repair the road up to the standard called for by the agreement if you will let me enter on the 3rd stage, let us get it quite clear what that standard is before I start so as to avoid you again finding (in the words of the letter) "all sorts of excuses saying this and that has not been done according to his wish. . . ."

In my opinion the learned trial judge was fully justified in preferring the evidence of the respondent (plaintiff) to that of the appellant (defendant) and in giving judgment accordingly for the sum which had been agreed was the appropriate amount of damages in the event of such a finding.

I would therefore dismiss the appeal with costs both in this court and in the court below.

Ong Hock Thye F.J.: This is an appeal against the judgment of Silke J., given in the High Court in Borneo at Sandakan, awarding to the respondent $26,075 as damages in a claim by him for breach of contract against the appellant.

There was, in the action, a counterclaim by the appellant for the sum of $9,200 being damages suffered by him on the ground that the respondent himself, rather than the appellant, was in breach of the same contract. The counterclaim was dismissed with costs. Although notice of appeal was entered against the whole of the decision, I observe that the memorandum of appeal was directed solely to criticisms of the judgment in the respondent's favour, without any particular reference to the counterclaim itself. This, however, I believe to be due to inadvertence. After careful consideration, I have come to the conclusion that, since claim and counterclaim represent merely both sides of the same coin, only one or the other must succeed in any event. For this reason, I hold that appeal against dismissal of the counterclaim has not been unequivocally, or necessarily, abandoned.

The contract in question was an agreement in writing dated February 15, 1963, whereby the respondent was granted, for a cash consideration payable by him in stages, the right to enter upon the appellant's land to extract timber therefrom, at his own expense and for his own profit. It was common ground that the respondent did enter on the first and second stages, covering 10 and 50 acres respectively, extracted timber therefrom and made the requisite payments. It was also common ground that completion of the second stage required completion of an earth road through the second section of 50 acres, so as to provide proper access to the land comprised in the third stage, which is farthest from the public highway, the Labuk Road to Sandakan. This stipulation was set out in clause 3 of the agreement as follows:—

"The contractors agree to make an earth road across the said land on the site as directed by the licensee, the making of such road shall also be on the same footing as the payment of the capital sum hereby agreed to be paid. This is to say the contractors shall construct the road in stages. The road shall be of a total width of 18 feet but the middle portion shall only be of 12 feet in width."

The main issue before the High Court was a question of fact: was the road through the second stage area constructed at all or in substantial compliance with clause 3? A secondary issue which, in the event, did not fall to be decided, was whether, to quote counsel for the respondent, "non-construction of the road" went to the root of the matter, or merely entitled the appellant to damages, but not rescission.

On the evidence the learned trial judge said:—

"I much prefer the evidence of the plaintiff on the question of the building of the earth road and I put little reliance on what the defendant said."

This, of course, means that he was largely influenced by the impressions which the demeanour of the respondent and his witness had produced on his mind. Whenever this point arises, whether at first instance or on appeal, it is, in my opinion, necessary to bear clearly

in mind the homily delivered by Lord Greene M.R. in *Yuill* v. *Yuill* [1] as follows:—

"We were reminded of certain well-known observations in the House of Lords dealing with the position of an appellate court when the judgment of the trial judge has been based in whole or in part on his opinion of the demeanour of witnesses. It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion. But when the court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction. It has never been laid down by the House of Lords that an appellate court has no power to take this course. *Puisne judges would be the last persons to lay claim to infallibility, even in assessing the demeanour of a witness.* The most experienced judge may, albeit rarely, be deceived by a clever liar, or led to form an unfavourable opinion of an honest witness, and may express his view that his demeanour was excellent or bad as the case may be. Most experienced counsel can, I have no doubt, recall at least one case where this has happened to their knowledge. I may further point out that *an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question.* If it can be demonstrated to conviction that a witness whose demeanour has been praised by a trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value."

With all respect to the learned trial judge, I think it is a great pity that, in the first place, he did not avail himself of the invitation of counsel, given at the close of examination-in-chief of the respondent, to visit the site. Counsel had asked the court to do so since it was readily accessible. But the judge replied:—

"It is necessary for the court to decide this case on the evidence produced before it by the parties. This is a matter of belief. I cannot, I regret, see the necessity of a site inspection or what assistance this would be. The issue, or one of them, is, was a road 18 feet wide and 12 feet wide in the middle built by plaintiff, not a mere road as such. Further it is a main issue: was the defendant correct in rescinding the contract even when the road was not built? I will not accept Mr. Yong's suggestion of visiting the site, certainly (not?) at this stage."

I regret to say that, in this respect, the learned judge had taken a view which is opposed to all authority. To quote Birkett L.J. in *Buckingham* v. *Daily News Ltd.* [2]:—

"As a judge of first instance, I visited factories, workshops, shops, cinemas — all for the purpose of seeing for myself the very nature of the place where the accident took place — the very material upon which the accident was itself founded."

In the same case Denning L.J. (as he then was) said:—

"Everyday practice in these courts shows that, where the matter for decision is one of ordinary common sense, the judge of fact is entitled to form his own judgment on the real evidence of a view, just as much as on the oral evidence of witnesses."

Had the judge seen the "road" itself, his decision can hardly have been open to question.

In the second place, it is a great pity, again, that the learned judge refused to admit in evidence photographs of the disputed "road", taken on the respondent's instructions in August 1965, copies of which had been duly supplied to the appellant's solicitors. These photographs were tendered by the respondent, without objection by the appellant, but held inadmissible merely because the photographer was not called to produce and identify them. This, I regret to say, resulted in material evidence being wrongly excluded, which should have proved almost as helpful as a view of the site itself. In the event, secondary evidence was admitted in lieu of the photographs. This took the form of letters between the solicitors for the parties, one claiming that the photographs provided evidence that the road was actually constructed, while the other denied that photograph No. 2 showed "any road at all." To this criticism the reply of the respondent's solicitors, by way of explanation, was as follows:—

"*Photograph No. 2:* The stretch of earth road covered by this photograph *is overgrown with creepers and grasses. Therefore it is not visible in the photograph.* The creepers and grasses could easily be slashed at little expense."

Contradicting this photograph, however, there is evidence that, the respondent went to the site with counsel and two witnesses on January 14, 1967 — only two days before the trial of the action — and one witness, Chong Luk San, testified that he "saw the road the same as before; some grass on it", while the other Voo Hon Chung, respondent's son, confirmed that he saw the road he had made *and there was "no change in the state* of the road." Had they been telling the truth, surely the photograph taken in August 1965 and the explanation given thereanent must have been false. I cannot, however, imagine anyone preferring the evidence of these witnesses to what was revealed by the photograph or to the explanation given by the respondent's own solicitors for the absence of any visible trace of the road in that photograph, since such explanation must have emanated from the respondent himself.

In the third place, the learned trial judge appears to have paid little or no regard to the contents of a letter in Chinese, written on July 25, 1965 by the respondent himself to the appellant's solicitors long before the issue of the writ on April 26, 1966. Its evidential value may be judged from the certified translation, which is as follows—

"Voo Sui Lim,
P.O. Box 723,
Sandakan.

Messrs. Peter Lo & Lim.

Dear Sirs,

I say, in reply, that concerning the construction of earth road on Mr. Tsen Ket Ming's land at mile 21, Labuk Road, as I had agreed in the previous agreement

to be responsible for the repairs to the road, it is no need to talk about and to urge. As I had promised it before why should the promise be not upheld later. But because Mr. Tsen Ket Ming had not fixed the standard road mark, its width and the necessary point for dumping earth; or the middle part of the road may be blocked by tree stumps. Because the previous agreement did not provide the uprooting of tree stumps, so if there are big tree stumps in the way, the road may pass by the side of them. This is a reasonable way of doing things.

As for myself, I fear that after completion of work Mr. Tsen Ket Ming will again find all sorts of excuses saying this and that has not been done according to his wish or he may also find excuses saying his rubber trees and fruit trees have been damaged and thereby claimed compensation etc., I now specially write, for the sake of plan of security of both parties to request your law firm to state clearly in connection with the construction of the earth road, the place for dumping earth, the express measurement of width of the area and other conditions of construction as follows:—

1. According to the regulations of construction of P.W.D. the width of the main road should be two chains (132 ft.) and the width of a branch road should be 1 chain (that is 66 ft.).
2. If big tree stumps are encountered in the middle of the road, then the road may go through other side.
3. If a stream or river is met, and the building of a bridge is necessary, then Mr. Tsen Ket Ming is responsible for the plan of construction.
4. If after the completion of the construction of the road rain spoil or damage it, then the builder of the road will not be responsible.
5. Workers in building the road should exercise care, should not do what they like and damage others.

Person undertaking to construct road

(Sgd.) Voo Sui Lim.

Translated by me
(Sgd.) Yong Ping Kwang
Official Interpreter."

This letter, of course, should have been contrued *contra proferentem,* as it expressed the respondent's own views on the fulfilment by himself of his own part of the contract. No prevarication or equivocation by him could have explained conditions 2 to 4 as other than clear admissions that he had failed in performance. Condition 1, as the respondent himself admitted, "was not a term at all, just a comparison" and he had no intention at all to conform to P.W.D. standards. This letter, and the circumstances under which it came to be written, provides, in my view, what Lord Sumner, in *British South Africa Co.* v. *Lennon,*[3] described as "irrefragable testimony of contemporary written communications" in the following passage of his judgment:—

"There are cases in which, in face of the irrefragable testimony of contemporary written communications or of a course of business, an appeallate tribunal may bring their knowledge of life and business to bear and say, confidently and rightly, that evidence given about them at the trial cannot be true, be the trial judge's impression of the witness what it may."

In his judgment, however, the learned judge termed this letter as "an offer *to repair* the road," although there is a wide gulf between the ordinary meaning of "repair" and "construction", in the Chinese or any other language. In taking the view he did, the learned judge appears to have accepted the respondent's oral evidence contradicting, varying, adding to and subtracting from the terms of a document, contrary to rules of evidence on the exclusion of oral by documentary evidence. Examples of the improper admission of such inadmissible evidence follow:—

(i) "What I meant was that I agreed to do the repairs for him to keep with the spirit of main agreement."

(ii) "Even though I used word construction I meant repairs as the road had already been made."

(iii) "I had built road even though I used words 'in building' in (clause) 5".

(iv) "I used words 'person- undertaking to construct road' as I wrote letter after discussing with defendant. I was not very well. I might have used wrong words."

(v) "I agree I used word 'repairs', once."

Had such oral evidence not been accepted, I am certain that the judge could not have construed the letter as an offer to repair, rather than a promise to construct.

Did the learned judge test his impression as to demeanour against the evidence of the witness in question? This was considered indispensable by Lord Sumner. I am satisfied that he did not. He had accepted not only the respondent's evidence, but that of his two witnesses at face value, as the following excerpt from his judgment plainly shows:—

"The evidence of the plaintiff's witnesses further shows that after stage II was entered upon and extracted, the road across it was levelled, but the road across stage one was not relevelled."

Yet the admission that *no levelling* was done to the road across stage I, in my opinion, should have afforded cogent evidence of the respondent's failure to perform his part of the contract, for his obligation to build a proper road applied *no less to stage I than stage II.* The respondent's two witnesses were his son, Voo Hon Chung, and a "gardener" Chong Luk San. The latter was "only an apprentice," a hookman in the lumber industry "employed primarily to extract timber from stage one," with no experience whatever in road building. Was it possible for the demeanour of these two witnesses and of the respondent himself to outweigh completely the "irrefragable testimony" provided by the respondent's admissions in his letter of July 25, 1965? As for myself I should have preferred the superior type of evidence.

Was the respondent's own evidence as to the road construction of such a nature that, after testing the same, the judge could accept him entirely as a witness of truth? The inescapable fact is that the learned judge dismissed two other heads of claim made by him for $550 and $3,070.60 respectively, which cannot be overlooked in any test of demeanour against evidence.

According to the respondent himself "the $550 is on basis of $25 per hour to level and it took us 12 hours." Even so, this works out at $300 only and the claim for almost double that amount was hardly honest. Two workmen were said to have been engaged at $9 and $6 per hour respectively. Hence the claim for $25 per hour was manifestly false as well. The other item of claim for $3,070.60 was not supported by any evidence whatsoever and rightly dismissed. Did these two heads of claim bear out the learned judge's impression derived from the respondent's demeanour? I think there can be only one answer.

I now turn to the three letters from the appellant's solicitors, dated December 14, 1964, January 5, 1965 and January 20, 1965. These were in plain unmistakable language, whether interpreted word-perfect or not. The respondent, however ill, was left in no doubt that he was charged, in the first place, with failing to perform his part of the contract; he was next given 14 days "within which to start building" and, finally, he was notified that the appellant was exercising his right to rescind for breach by the other party. Yet, well knowing the purport of these communications from solicitors, the respondent took no action whatsoever. He failed to deny that he was in breach, he failed to do what was required, or even to convey his readiness to carry out his part. Not until July 25, 1965 did he condescend to reply; even then it was an admission of his own failure.

The salient fact which appears to have been overlooked is that work on stage II was performed by a sub-contractor. Road construction, if it ever was done, should have been part and parcel of the job of extracting timber. Yet the sub-contractor was never called to give evidence. With all respect to the learned judge, therefore, the whole of the evidence leads me to conclude that what the respondent attempted to pass off as a road was nothing more than the track made when logs were dragged out by tractor. The onus of proof should have been discharged by the respondent, as plaintiff, for him to be entitled to succeed. On the evidence I hold that he failed to do so. He was in breach himself and, as the party in default, he was hardly in a position to complain of a breach by the other: see *Tan Ah Boon* v. *State of Johore.*[4] As Lord Roche said:—

> "This is simply a common law action seeking damages for breach of an alleged contract and nothing else. No plaintiff can maintain such an action unless he can aver and prove that he has performed or has at all times been ready to perform his part of the contract."

The same principle applies here, since the respondent had never made any attempt to perform his part, even after the notices were given in December 1964 and January 1965. Having so failed, he had clearly lost all right to be given entry into the appellant's land for stage III. Nor under the circumstances, can the respondent's reply of July 25, be held to revive his rights under the contract. It had taken him over 7 months to reply after he was given the opportunity to perform his part, had he so desired, and no offer could reasonably have been kept open for all that length of time, especially after notice of rescission was given on January 20, 1965. I would accordingly dismiss the claim in respect of breach of contract, which the learned trial judge had allowed in the sum of $26,000.

As to the balance of $75 I observe that the claim rested on a separate express oral contract. Neither in the statement of claim nor in the evidence of the respondent was he able to name the time or place the contract was made. The claim was never made until first intimation thereof appeared in the statement of claim and it was flatly denied. On the whole of the evidence, I would again hold that he had not discharged the onus of proving any such verbal contract as alleged and that the judgment as to this item also should be set aside.

There now remains the appellant's counterclaim. Since the respondent is held to have failed to build the road through stage II, it follows that the appellant must succeed in his counterclaim for damages sustained by him in consequence of the respondent's failure to perform his part of the contract. The total claim for $9,200 comprises two items, the first being a sum of $4,200, the contractual amount payable to a new contractor for constructing the road left undone over both stages I and II. The appellant had produced in evidence a contract made on October 1, 1965 of which I quote the relevant clauses:—

> "7. It is also mutually agreed that the tractor owner shall build a road 60 chains long and 18 feet wide for the sum of $4,200 on the said land to be completed three (3) months from the date hereof.
>
> 8. The Hirer has paid $3,000 as an advance to the Tractor owner and the Tractor owner hereby acknowledges receipt of same."

The receipt for $3,000 was also produced. It was explained that work on this contract remains to be performed by reason of the threat of litigation which subsequently arose. This is an understandable precaution, for the reason which the appellant gave, that had he allowed the road construction to proceed, the respondent might have claimed that the road was built by him. His evidence was confirmed by the contractor, Ng Yu Loi. Examination of the evidence leaves no doubt in my mind that this was a *bona fide* contract and not evidence concocted to bolster a false claim. Indeed its genuineness was never impugned in cross-examination, nor the receipt. The amount does not appear inflated or unreasonable. According to the respondent himself, "repairs" would have cost him more than $1,000; construction should be costlier. I would accordingly award the appellant $4,200 as claimed.

As to the second item, which was consequential damage by reason of higher planting costs, putting it briefly, I do not think this was damage within the contemplation of the parties as likely to result from breach when they entered into the contract. I do not think it necessary to say more than that I would disallow the claim on this head.

In the result, I would allow this appeal, set aside the judgment of the High Court and enter judgment for the appellant on his counterclaim in the sum of $4,000. He will be entitled to costs both here and in the court below.

There appears to have been some ambiguity in the order of the High Court as to costs, awarding to the plaintiff two-thirds of his taxed costs on the claim and again costs of the counterclaim to be taxed. If that was the true intention of the order I regret to say that it is wrong. I would make it clear that claim and counterclaim in this case cannot be separately compartmentalised and only one bill of costs may be drawn, both for the proceedings in the High Court and on this appeal.

MacIntyre F.J.: I have had the advantage of reading the judgment of Pike C.J. with which I concur. However, in view of the dissenting judgment of Ong Hock Thye F.J., I would like, with respect, to give my own reasons for concurring with the judgment of the learned Chief Justice.

The appeal was argued on one ground only, namely, that the evidence as a whole did not support the plaintiff/respondent's case, having regard to (a) the contradictions in his evidence; (b) his conduct in failing to reply three letters (P3, P4 and P5) which he had received from the defendant/appellant's solicitor; and (c) his failure to call the proprietor of Fong Hin Company to corroborate his allegation that he wrote P6 after a discussion with the appellant in the presence of the said proprietor.

The facts of the case have been stated briefly but clearly in the judgment of the learned Chief Justice, and I shall not repeat them. On the pleadings, the main issue for trial was: whether or not the respondent was in breach of clause 3 of the agreement by his alleged failure to construct a road in two stages through 60 acres of the appellant's land held under a licence to extract timber? No plan or specification of works was appended to the agreement but according to the particulars given in clause 3, it was to be an earth road, 18 feet wide with a centre 12 feet wide. The road was to be constructed in stages as directed by the appellant. The learned trial judge found that the respondent had constructed such a road.

Exhibit P3 is a letter which was written by the appellant's solicitor on the 14th of December, 1964 to the respondent drawing his attention to his failure to construct the road as agreed and threatening legal action unless the requirements of clause 3 were complied with. P4 is a reminder to P3 and P5 is a notice rescinding the contract in view of respondent's failure to reply to P3 and P4. The respondent's explanation was that he did reply P4 and posted the letter to appellant's solicitor, and was not therefore responsible if the letter went astray. As for P3, he admitted not replying it as he had wasted his time making several abortive attempts to contact, the appellant's solicitor, Mr. Lim, personally.

It would appear from the evidence that when P3 was written, the respondent had, as far back as April 1964, completed his contract for the the extraction of timber in the 1st and 2nd stages, and was awaiting a permit from the Forest Department to enter the 3rd stage. The permit, it would appear, would only be issued when the appellant had fully replanted with rubber the area where timber had been extracted. Hence the delay. It seems extraordinary that the appellant, under whose direction the respondent was to have made the road, should have waited seven months after the completion of the extraction in the 2nd stage to complain that the road had not been made. It would also appear remarkable that the belated discovery was made at about the time when the price of timber was rising and the issue of a permit to enter the 3rd stage was almost imminent. It is reasonable to assume, that the 3rd stage was worked by the appellant himself since the contract which he entered into with one Ng Yu Loi was only for the purpose of hauling timber from the forest reserve to the public road and to build a road 60 chains long. It would, therefore, appear as if the appellant had a sound financial reason for rescinding his contract with the respondent.

Exhibit P6 is a letter in Chinese written on July 25, 1965 by the respondent to the appellant. It is wholly immaterial whether it was written after discussion with the appellant or whether the proprietor of Fong Hin Company was present at the discussion. It was contended on behalf of the appellant that the content of this letter which is written in quaint language amounted to an admission that the road had not been built. The opposite view, with which I agree, is that it amounts to an offer to repair or remake an existing road. There had been difficulty in translating this letter, and even Ong Hock Thye F.J. remarked, in the course of the appeal, that the Chinese character which was translated into the word "construction" in the first line of the letter could have very well been translated to read "repair". However, the trial judge had before him other aids to interpret the meaning of the letter as a whole, namely, certain admissions made by or on behalf of the appel-

lant. The appellant had said in evidence and I quote:—

"Of course, he made his own road. We planted the road made by Voo on second stage with rubber trees. Also planted track made by Voo on 1st stage."

At page 55 of the record, the appellant's counsel is recorded to have made the following admission from the bar, and I quote:—

"Not deny existence of road or track. We say not in conformity with clause 3 of the agreement."

Seen in the light of these admissions, the respondent's explanation of P6 as an offer to repair or remake the existing road seems reasonable and logical. The admissions also discount the suggestion that the "indifferent and lethargic attitude" shown by the respondent towards the 3 letters (P3, P4 and P5) he received" was consistent with the conduct of a man who had nothing to say in reply.

There was, therefore, ample evidence before the trial judge, apart from the demeanour of witnesses, to justify his finding of fact that a road had been constructed, in accordance with the agreement. I, therefore agree, that this appeal should be dismissed, with costs both in this court and in the court below.

Appeal dismissed.

PUBLIC PROSECUTOR v. KANG SIEW CHONG

[A.Cr.J. (Raja Azlan Shah J.) April 29, 1968]
[Raub — Criminal Appeal No. 2 of 1966]

Penal Code, ss. 44 and 385 — Extortion, attempted threat to exercise legal power for an illegal purpose — "Injury" — Meaning of.

A threat to exercise a legal power in an illegal manner is an "injury" within the meaning of section 44 of the Penal Code.

Where a police officer, in exercise of his power under regulation 7(1) of the National Registration Regulation, 1960, threatens to take a person to the police station in order to take his particulars, and the threat is made with the object of exacting payment of money that is not due, the exercise of the power is illegal, and the threat constitutes a threat of "injury" within the meaning of section 44 of the Penal Code.

Case referred to:—

(1) *B. Appalasami* (1892), 1 Weir 441.

CRIMINAL APPEAL.

Abdullah bin Ghazali (Deputy Public Prosecutor) for the appellant.

R. C. M. Rayan for the respondent.

Raja Azlan Shah J.: The accused was charged with attempted extortion by putting a courting couple in fear of injury and thereby inducing them to deliver cash $50 to him, an offence punishable under section 385 of the Penal Code.

The learned president acquitted him at the end of the whole case on the sole ground that one of the ingredients of the section, that is, fear of injury, was not proved beyond reasonable doubt. He observed that he should have acquitted the accused at the close of the prosecution case had he been aware of the provisions of regulation 7(1) of the National Registration Regulation, 1960, which *inter alia,* empowers a police officer at any time to require any person to produce his identity card for inspection. It is necessary to reproduce his reason:—

"It has been held by the High Court that the exercise or the threat to exercise a legal power legally is not 'injury' — reference March issue M.L.J. 1962 at pages xxix & xxx, under the title 'Legal Logic'.

From the prosecution evidence, I find that accused No. 1 had threatened to take both P.W.1 and P.W.2 to the police station in order to obtain their particulars. Accused No. 1 was a police officer in uniform. He was merely exercising his legal power under regulation 7(1) quoted above in requiring P.W.1 and P.W.2 to produce their N.R.I.C. to him. Even if he had taken P.W.1 and P.W.2 to police station in order to obtain or establish their identities, accused No. 1 was still exercising his legal power in a legal manner.

Therefore the threat by accused No. 1 that he would take both P.W.1 and P.W.2 to police station did not amount to putting a person 'in fear of injury' ".

It was proved that at about 8.00 p.m. on 25th February 1965 a couple were sitting in close proximity to each other on a bench in a football field in such circumstances that their behaviour was open to question. The man was a married man and the girl was unmarried. At about 10.00 p.m. the accused entered the field. He was a police constable and was in uniform. He questioned the couple as to their misconduct and demanded their identity cards. The couple did not have their identity cards with them. He threatened to take them to the police station unless they gave him $50. He allowed the man to go home to fetch the money, but the girl was left behind to act as hostage. The man instead went to the police station and lodged a report.

In my view the learned president had properly directed his mind on the law that the threat to exercise a legal power does not constitute injury within the meaning of section 44 of the Penal Code. But where he had erred was in failing to consider the exercise of the legal power. Under the section it is incumbent to distinguish between the threat to use the process of law and the exercise of that process. The former, for example, as in the present appeal the threat to take the couple to the police station in order to obtain their particulars, does not constitute injury as prescribed in section 44. But if, as in this appeal, the threat is made with the object of exacting payment of money that is not due, it is an abuse of the exercise of that power and is therefore illegal, and such a threat made with such an object constitutes a threat of injury within the meaning of the section. A close